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No. 84 —

IN THE

Supreme Court of the United States

October Term, 1984

V. P. GOTTSCHALL and V. P. GOTTSCHALL AS CUSTODIAN under the Uniform Gifts to Minors Act for NICHOLAS P. GOTTSCHALL and TERESA GOTTSCHALL, Minors, all in their own behalf, and for all others similarly situated,

Petitioners,

vs.

JONES & LAUGHLIN STEEL CORPORATION, Paul Thayer, Raymond A. Hay, Thomas C. Graham, G. E. Smith, and D. T. Kalil,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

Petition For A Writ Of Certiorari

Counsel of record for Petitioner:

V. P. Gottschall
9351 Tanbark Drive
Pittsburgh, PA 15237
412/456-4427

July 10, 1985

QUESTIONS PRESENTED FOR REVIEW

1. Without having an adversary hearing or making any findings of fact, is it constitutional under the First and Fourteenth Amendments to prohibit an attorney from discussing public documents with anyone (including his clients) or even with another attorney unless he has provided:

   a. written notice to opposing counsel of the proposed discussion with another lawyer
   b. the consent of the other attorney to be bound by the order
   c. assurance that the other attorney is not involved in any pending litigation against the defendant?

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No. 84/--/

SUPREME COURT OF THE UNITED STATES
October Term, 1984

V. P. GOTTSCHALL, et al.,

Petitioners,

vs.

JONES & LAUGHLIN STEEL CORPORATION, Paul Thayer, Raymond A. Hay, Thomas C. Graham, G. E. Smith, and D. T. Kalil,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari be issued to review the decree of the Supreme Court of the Commonwealth of Pennsylvania in this case.

OPINIONS BELOW

The Pennsylvania Superior Court's opinion is reported at 482 A.2d 979 (Pa.

Super 1984) and is reproduced at 3a.

The Opinion of Judge Silvestri is unreported but is reproduced at 20a.

JURISDICTION

The order of the Pennsylvania Superior Court was entered on September 7, 1984 and the motion for reargument was denied on November 9, 1984, (2a). The Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on April 16, 1985 (1a). This Petition for a Writ of Certiorari has been filed within 90 days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, which provide as follows:

> Congress shall make no law. . . abridging the freedom of speech, or of the press,

U.S. Const., amend. I.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, Section 1.

STATEMENT OF THE CASE[1]

On October 29, 1980, V. P. Gottschall ("Mr. Gottschall") and other named plaintiffs (all holders of Jones & Laughlin Steel Corporation[2] (J&L) preferred stock) filed an action in equity and mandamus against J&L, Paul

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[1]Two cases, consolidated on appeal, involved different Orders in separate cases. To facilitate consideration, the early stages of each case are described separately.

[2]The LTV Corporation is the parent of J & L (now LTV Steel) and, other than wholly-owned subsidiaries, there are no affiliates known to Petitioner.

Thayer[3], D. T. Kalil[4] and other officials of The LTV Corporation ("LTV") in the Court of Common Pleas of Allegheny County. The defendants as a group are (as is the individual defendant in the second case) also referred to as LTV, the controlling entity. LTV owned all of J&L's common stock but, at the time the case was filed, none of its preferred stock. The case sought to compel compliance with 15 P.S. Section 1308 (access to corporate records by shareholders) and to protect the public shareholders from ongoing abuse by LTV. LTV had already settled

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[3]Mr. Thayer became Deputy Secretary of Defense and is presently in jail for obstructing justice.

[4]Mr. Kalil resigned as General Counsel of J&L when it was disclosed that he was not authorized to practice law. He presently works for a privately held scrap company doing business with J&L.

one case brought by Mr. Gottschall by agreeing to comply with the Pennsylvania Business Corporation Law and mailing business and financial information to the holders of the Preferred Stock. In that case the question of disqualification was not raised and no gag order was sought or entered.

On December 30, 1980, counsel for defendants ("LTV's Counsel") presented to Judge Silvestri (but not Mr. Gottschall) certain papers, including an affidavit from D. T. Kalil, in support of defendants' effort to disqualify Mr. Gottschall as a party-plaintiff. The theory advanced by LTV's counsel was that Mr. Gottschall's prior employment as an Assistant General Counsel of J&L barred him from participating in the case. LTV submitted a proposed Order of

Court which sealed all documents filed, or to be filed, in connection with the Petition for Disqualification and which prohibited Mr. Gottschall "from disclosing [them] to any third party."

That same day, Judge Silvestri conducted an in chambers meeting attended by LTV's counsel and by Mr. Gottschall; refused Mr. Gottschall's request for time in which to respond to the proposed Order of Court; refused Mr. Gottschall's request to be shown the documents which LTV's counsel had presented to Judge Silvestri; responded to Mr. Gottschall's objections that the proposed Order violated the First and Fourteenth Amendments by saying that Mr. Gottschall had no Constitutional rights; and entered the proposed Order of Court. No transcript or other record was made

of the in chambers meeting of December 30, 1980.

On December 29, 1980, Mr. Gottschall filed a complaint in the Court of Common Pleas of Allegheny County seeking the involuntary dissolution of the defendant, Jones & Laughlin Steel Corporation for fraud and failure to comply with statutory provisions requiring disclosure of financial information to shareholders, pursuant to 15 P.S. Section 2107.

On January 29, 1981, LTV's counsel gave Judge Silvestri a "Petition for Disqualification" seeking the disqualification of Mr. Gottschall on the same grounds asserted in the previous action; an affidavit from D. T. Kalil; and a similar order. That same day, Judge Silvestri conducted a meeting

in chambers which followed the same course described above. However, the proposed Order of Court had a limited exception permitting disclosure to prospective counsel after prior written notice to LTV's counsel and the agreement of prospective counsel to be bound by the Order. Again, no transcript or record of this meeting was made.

Contrary to the statement by the Superior Court (7a) Judge Silvestri had not scheduled a hearing on the Petitions to Disqualify when appeals (based on the Constitutional issues) from the two orders were timely taken in January and February 1981. Not until March 26, 1981 (three months after the entry of the first order) did Judge Silvestri indicate that a hearing on the Petitions for Disqualification would be held. Mr.

Gottschall then applied to the Pennsylvania Superior Court for a stay, which was granted, of that hearing because of the constitutional problems.

On October 12, 1981 Mr. Gottschall submitted Rectum Rogares in both cases requesting Judge Silvestri to "Do Right" by filing opinions as required by Pennsylvania Rule of Appellate Procedure 1925 to permit the scheduling of the appeals for argument. On October 20, 1981 Judge Silvestri denied the Rectum Rogares.

Without an opinion below the appeals had not been scheduled for argument. On October 31, 1983 Mr. Gottschall filed an action in Mandamus, invoking the original jurisdiction of the Supreme Court of Pennsylvania, to compel Judge Silvestri to file an

opinion. In response to that suit Judge Silvestri filed a Memorandum Opinion on November 21, 1983.

The Memorandum Opinion states that the January 29, 1981 Order is one

> "enjoining the plaintiff [Mr. Gottschall] and any counsel of record from discussing the sealed portion of the record with any third party, with the exception of a limited class of attorneys."

The opinion did not address the Constitutional questions but its filing permitted the appeals to be heard.

After the appeals were heard in May, 1984 and the Constitutional issues argued, on September 7, 1984 the Superior Court quashed the appeals on the basis that the orders were not final and the court lacked subject matter jurisdiction. The court did not reach the Constitutional issues. It held

> "Since this court lacks subject matter jurisdiction, we cannot consider the merits of these consolidated appeals." but added "Appellant suffers no irreparable injury . . . because the sealed information will remain available for future dissemination." and "They [the orders] are a means to avoid potential contravention of the policies underlying canons 4 and 9 of the Pennsylvania Code of Professional Responsibility". (18a and 19a).

A Petition for Reargument was timely filed on September 21, 1984. That Petition was denied, per curiam, on November 9, 1984. On December 3, 1984 Mr. Gottschall timely filed, with the Pennsylvania Supreme Court, a Petition for Allowance of Appeal from the November 9, 1984 decision. On April 16, 1985 that Petition was denied, per curiam.

REASONS FOR GRANTING THE WRIT

Review on certiorari is merited under Rule 17.1 of the Rules of the

Supreme Court. The decision of the Pennsylvania Superior Court departs from the decisions of this Court in permitting entry of a broad ban on expression, including a prior restraint on communication with prospective counsel, in the absence of the specific factual findings needed to support such a ban. Moreover, the lower courts ignored the First Amendment interest in discussion of previously published information related to matters of great public concern - the appointment of Mr. Thayer to a high political post, his subsequent resignation, and his recent incarceration for obstruction of justice.

I. The Lower Court Did Not Apply the Procedural Safeguards Which This Court Requires to Support Any Restraint on Expression.

1. Prior Restraint

A prior restraint constitutes "one of the most extraordinary remedies known to our jurisprudence." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976). It is the "most serious and the least tolerable infringement on First Amendment rights." Id. at 559. In Vance v. Universal Amusement Co., Inc. 445 U.S. 308, 315-16 (1980) the Court said the "burden of supporting an injunction against a future exhibition is even heavier than the burden justifying the imposition of a criminal sanction for a past communication." and cited other cases for the proposition that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."

A prior restraint "must fit within

one of the narrowly defined exceptions to the prohibition against prior restraint . . . " Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

> "[T]he publication must inevitably, directly, and immediately cause the occurence of an event kindred to imperiling the safety of a transport already at sea. . . In no event may mere conclusions be sufficient . . . and not less so because the restraint was [allegedly] justified as necessary to afford the courts an opportunity to examine the claim more thoroughly."

New York Times Co. v. United States, 403 U.S. 713, 726-28 (1971).

In the less burdened context of a closure order, Waller v. Georgia, 81 L. Ed 2d 31 (1984), held the court must: 1) find an overriding interest in secrecy rather than disclosure; 2) support that conclusion with specific findings on the

record; 3) consider alternative methods of control; and 4) narrowly tailor the control. Judge Silvestri did not even meet any of those tests. He reversed the prior restraint presumption that disclosures should be punished after they are made and found to be improper rather than prohibit them from being made.

Even after three years and repeated briefing of the Constitutional issues, when Judge Silvestri was finally forced to write an opinion in 1983 he did not attempt to comply with the Constitutional requirements. Significantly, in a fact situation similar to that before this Court the court in Pennsylvania v. Buehl, 462 A.2d 1316, 1323 (1984 Pa. Super) held that an opinion filed after the appeal was taken on a closure order was too late and

was "in essence an after-the-fact, ex parte, statement . . . The court must state before ordering closure why it considers alternatives to closure unsatisfactory." The only matter in the Memorandum Opinion which could be considered to be a specific finding of fact is

> "it appearing from the record in the proceedings that the plaintiff, V. P. Gottschall immediately prior to the filing of the within proceedings, was Assistant General Counsel of the defendant (emphasis added)."

Judge Silvestri's belated finding is not relevant to the Constitutional issue which requires a specific finding of harm and is wrong. J&L did not even allege that Mr. Gottschall was Assistant General Counsel "immediately prior to the filing" and had stated

that Mr. Gottschall's employment with J&L terminated on January, 15, 1979 - twenty-three months before the "filing of the within proceedings." He did not consider alternate methods of control and used a broad brush rather than narrow tailoring.

Given the additional fact that most of the documents placed under seal are public documents, the egregious violation of rights becomes self-evident. A discussion with counsel of a newspaper article published nearly two years after the termination of any relationship with J&L cannot constitute even a "potential contravention" of any policy. In this case no basis, principled or otherwise, was given nor could be given for prohibiting discussion of newspaper articles without

prior notice to opposing counsel.

2. The Orders Were Entered With No Finding of Harm Which Could Be Caused by Discussion of Public Material.

In discussing the sealing of records, this Court has said that each case must be resolved by "weighing the interests advanced by the parties in light of the public interest and the duty of the courts." See Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). However, it is clear that Judge Silvestri failed to weigh the interests advanced by one of the parties - Mr. Gottschall was not permitted to examine the documents.

The most chilling indictment of the ex parte nature of the proceedings below is illustrated by the status of Mr. Kalil. Mr. Gottschall was not allowed to cross examine him. LTV failed to

tell the Judge that it knew Mr. Kalil had been found "unfit to be entrusted with professional or judicial matters or to aid in the administration of justice". See In the Matter of David T. Kalil, No. 84 785, Wayne Co. Cir. Court Mich. 1957. Mr. Gottschall had to develop that information, through the Michigan Bar, on his own.

In a less dramatic situation, involving an affidavit by a lawyer rather than an affidavit by someone acting as an attorney, the Court in In re Iowa Freedom of Information Council, 724 F.2d 660, 662 (8th Cir. 1983) held

> "In such an important matter, courts should not simply take representations of interested counsel on faith."

Had he been permitted to cross-examine Mr. Kalil, Mr. Gottschall would

have: Brought out that Mr. Kalil was suspended from the practice of law in Michigan, the jurisdiction in which he asserted he was admitted to practice (which Mr. Gottschall established late in 1983); or Mr. Kalil would have committed perjury. As alleged in his suspension proceedings, David T. Kalil's

> "conduct is contrary to justice, ethics, honesty, and good morals, and is prejudicial to the proper administration of justice."

The decision of the Pennsylvania Superior Court is also in direct conflict with decisions of the federal appellate courts governing the issuance of judicial orders restraining expression. For example, the Sixth Circuit, in WXYZ, Inc. v. Hand, 658 F.2d 420, 426 (6th Cir. 1981), relying

upon Nebraska Press, concluded that mere "surmise or conjecture that untoward consequences may result" cannot justify a judicial restraint upon publication. Similarly, when a former business executive sought to enjoin a television broadcast, the Ninth Circuit concluded that such an order would be unconstitutional because of the absence of a specific showing of harm. Goldblum v. National Broadcasting Corp., 584 F.2d 904, 906-07 (9th Cir. 1978). The concept of avoiding merely a "potential", as opposed to a finding of a, "contravention of policies" as advanced by the Pennsylvania Superior Court is an improper substitute for the specific showing of harm required by decisions of this Court and other courts.

Indeed, given the fact that most of the documents under seal are public documents, the egregious nature of the error becomes even more self-evident.

3. There Were No Findings Concerning Alternate Means of Controlling Any Allegedly Improper Use of Information.

The Orders cannot meet the standard set forth in Coles v. Marsh, 560 F. 2d 186, 189 (3rd Cir.) cert. denied 434 U.S. 985 (1977):

> "[T]he district court must find that the showing [of the particular abuses threatened] provides a satisfactory basis for relief * * * giving explicit consideration to the narrowest possible relief which would protect the respective parties."

In contrast, neither court below utilized or discussed the procedure outlined by the court in Publicker Industries v. Cohen, 733 F.2d 1059 (3rd Cir. 1984) - an in camera inspection,

with counsel present and on the record. However, Judge Silvestri had rejected Mr. Gottschall's request for a similar procedure. The Publicker court reversed the gag order

> "because the district court failed to articulate overriding interests based on specific findings . . . and failed to consider less restrictive means to keep this information from the public, we need not reach the merits of this question. These errors alone constitute an abuse of discretion." at (1074).

In stark contrast with that standard Judge Silvestri made no effort to draw the orders narrowly (he merely signed the proposed orders), did not consider (let alone give explicit consideration to) less restrictive alternatives, and made no findings of any threatened abuse.

Under the most charitable view, if

the documents appended hereto as Exhibits A and B were discussed with counsel without prior written notice to LTV's counsel, they could not possibly contravene any "policy." They were in fact previously disseminated and remain in the public domain. Given that undisputable truth, it cannot be seriously maintained that the Orders were "narrowly drawn and precise" or that there are not "alternative means of protecting the public interest which intrude less directly on expression."

As the court in Commonwealth v. Trinkle, 124 A.2d 191 (1921) said, procedural safeguards are necessary to prevent a "strictly private trial, or star chamber proceeding. . . " using "statements not deserving the name of evidence, oft-times through the caprice

of the ruling monarch." The need for procedural safeguards was confirmed in Gulf Oil Company v. Bernard, 452 U.S. 89, 104 (1981) where this Court stated specifically that "the mere possibility of abuses does not justify the routine adoption of a communication ban."

The concept of avoiding merely a "potential contravention of policies" as advanced by the Pennsylvania Superior Court is diametrically opposite to holdings of this Court and should be rejected. The orders are contrary to the Constitution, case law, and fundamental rules of fair play. They should be vacated.

II. The Decision Below Is Contrary to Numerous Holdings that Discussion of Information on the Public Record Cannot be Enjoined.

1. The Courts Below Incorrectly Made

Their Decisions on the Procedural Point and Ignored the Constitutional Issues.

After he was sued by Mr. Gottschall, Judge Silvestri explained his reason for not filing the opinion required by Court rules, by saying he believed the Orders were not final and he did not believe he needed to write an opinion. In contrast this Court found that fragile First Amendment rights are often lost or prejudiced because of delay. Gulf Oil Co. v. Bernard (supra).

The Superior Court, without any cited authorities, said Mr. Gottschall

> "suffers no irreparable injury . . . because the sealed information will remain available for future dissemination" (18a).

On the other hand, the court in Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir.

1983) held that a forty-eight hour delay to weigh Sixth Amendment rights against the right of access was too long and said

> "the effect of the order is a total restraint on the public's first amendment right of access even though the restraint is limited in time" at 1147.

This Court's opinion in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) addressed the question of finality. The decisions in North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc. 414 U.S. 156 (1973) and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) were cited for the proposition that "[I]t would be intolerable to leave unanswered . . . an important question . . . under the First Amendment." at 484, 485. See also National Socialist Party of America v.

Village of Skokie, 432 U.S. 43, 44 (1977) which held that order was:

> "a final judgment for purposes of our jurisdiction, since it . . . will deprive them of rights protected by the First Amendment. . ."

If the Orders which enjoin Mr. Gottschall from communicating with others should remain in effect without correction on review until such time as a "final order on the merits" shall have been entered, then the fundamental First Amendment rights of Mr. Gottschall, the class he represents, the administration of justice (because portions of the records of Messrs. Thayer and Kalil cannot be given to the authorities by Mr. Gottschall) and the public shall have been further and irreparably harmed. The First

Amendment does not become irrelevant because Mr. Gottschall is an attorney.

2. Most of the Material Covered by the Orders Was Filed by Respondents with the Securities and Exchange Commission or Has Been Published in Newspapers

In Nixon v. Warner Communications, Inc., supra at 597, this Court said:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.

The documents in this case include an old, 1974, proxy statement, a 1976 press release (exhibit A) and a newspaper article published in the winter of 1980 (exhibit B).

Moreover, unlike the situation presented to this Court in Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984), the documents involved in this

case were not secured from LTV by the discovery process. Instead LTV, Mr. Thayer, and Mr. Kalil for their own purposes, put various public documents before the trial judge and asked that Mr. Gottschall be "gagged." Before Mr. Gottschall was permitted to see the documents, the trial judge entered the order which not only placed the documents under seal but imposed a restraint on Mr. Gottschall's discussing those public documents and his then unwritten response to the Petition to Disqualify - even with counsel!

U.S. v. Marchetti, 466 F.2d 1309 (4th Cir) cert. denied 409 U.S. 1063 (1972) held that the First Amendment precludes restraints with respect to unclassified, disclosed information.

See also Maryland v. Baxter, 7 Med. L. Repts 1374 (1981) where a gag order was stricken because the contents had already been widely publicized and Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) where it was held that once truthful information was publicly revealed a court could not restrain its dissemination.

In Smith v. Daily Mail Publishing, 443 U.S. 97 (1979) this Court held that once a document is in the public domain a court may not constitutionally restrain its dissemination.

The fact that a major local employer and an arrogant leader of the military - industrial complex, who is presently in jail for obstruction of justice, sought the gag order (knowing normal litigation could undermine their

illegal schemes) does not alter its unconstitutionality. Messrs. Thayer and Kalil found out that, even with the gag orders in place, some of the truth has already come out. They are not above the law even though it took a three year investigation by Mr. Gottschall and the government of the United States, while these gag orders were in effect, to incarcerate Mr. Thayer and remove Mr. Kalil as J&L's General Counsel. So too should the LTV Orders be subjected to the rule of law. Abridging Mr. Gottschall's rights to discuss public documents constitutes an absurd exercise in futility because the truth can and will be told.

III. The Pennsylvania Superior Court Failed to Consider the Effect the Orders Had on Petitioners Ability to Secure Counsel.

The restrictions on Mr. Gottschall's right to secure counsel is another urgent reason justifying the assumption of plenary jurisdiction. In Doe v. District of Columbia, 699 F.2d 1115, 1119 (1983 D.C. Cir.) the court said "the right to a hearing would be meaningless were the litigant forbidden to obtain the assistance of a lawyer" and cited Powell v. Alabama, 287 U.S. 45 (1932) for the proposition that such a situation would be a denial of due process. Allowing the orders below to remain in effect would sanction the denial of Mr. Gottschall's Constitutional right to due process and the equal protection of the laws concerning the right to counsel as well as his First Amendment rights. Judge Silvestri's belated Memorandum Opinion

says that Mr. Gottschall is enjoined from talking to any third party "with the exception of a limited class of attorneys." However, the reality is the "limited class" is effectively every attorney because the order only permits discussion with those attorneys specified in prior written notice to LTV's counsel. The assertion by LTV's counsel that "Unless and until he [Mr. Gottschall] would be disqualified as counsel, he presumably has not been deprived of adequate representation" further illustrates the blindness that arrogance breeds.

The Superior Court would not reverse the orders even though they prevent Mr. Gottschall from discussing both public documents and his response to the Petition to Disqualify with

prospective counsel unless he: 1. provided prior written notice to LTV's counsel; 2. prospective counsel was not involved in litigation with J&L; and 3. prospective counsel agreed to be bound by the terms of the Order. When a litigant can be denied his right of freedom of speech and his right to counsel it is an issue of dramatic public importance deserving consideration by this Court.

Mr. Gottschall's affidavit concerning the effect of the Orders on his ability to secure counsel was filed below and is reproduced as Exhibit C.

CONCLUSION

The speculation used by the Pennsylvania Superior Court would justify entry of a ban upon any communication. It upholds the sealing

of newspaper articles published years after Mr. Gottschall left J&L, did not consider less restrictive means, and did not find any harm which would be caused by discussion with counsel of public information concerning individuals involved in matters of ongoing public interest. Paul Thayer, who resigned as Deputy Secretary of Defense of the United States because of an investigation by the Securities and Exchange Commission, pled guilty to obstruction of justice, has been sentenced to four years in jail for obstruction of justice, and will be seeking parole. Mr. Smith has been criticized by the U.S. Government for failing to protect the shareholders of LTV in connection with Mr. Thayer's

transgressions against LTV. David T. Kalil resigned as the Vice President and General Counsel of Jones & Laughlin when it was disclosed that he was not authorized to practice law but is now seeking readmission to the bar.

In conclusion, the decision below utterly fails to address the significant First and Fourteenth Amendment problems inherent in any judicial order that forbids discussion of public documents with prospective counsel unless opposing counsel receives prior written notice of that discussion. Mr. Gottschall did not forfeit his Constitutional rights vis a vis J&L by having worked for J&L.

For these reasons, a writ of certiorari should be issued to review

the judgment and opinions below.

DATED July, 10, 1985.

Respectfully submitted,

_____

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APPENDIX

The Supreme Court of Pennsylvania
Western District

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Deputy Prothonotary

April 17, 1985

In Re: V. P. Gottschall, etc., et al. v. J&L Steel Corp., et al. No. 396 W. D. Allocatur Docket 1984

"April 16, 1985
Petition Denied
Per Curiam"

The Superior Court of Pennsylvania
Sitting at Pittsburgh

J. Haniel Henry
Prothonotary

801 City-County Building
Pittsburgh, PA.
15219

Irma T. Gardner
Deputy Prothonotary

November 9, 1984

In Re: Gottschall, et al. vs. Jones & Laughlin Steel, et al. Nos. 59 & 267 Pittsburgh, 1981

"AND NOW, this 9th day of November, 1984, appellant's application for reargument is denied.

Per Curiam"

V.P. GOTTSCHALL, Appellant,

v.

JONES & LAUGHLIN STEEL CORPORATION.

V.P. GOTTSCHALL, and V.P. Gottschall, as custodian under the Uniform Gifts to Minors Act for Nicholas P. Gottschall and Teresa Gottschall, Minors, All In Their Own Behalf, and for all others similarly situated

v.

JONES & LAUGHLIN STEEL CORPORATION, A Corporation, and Paul Thayer, Raymond A. Hay, Thomas C. Graham, G.E. Smith and D.T. Kalil.

Appeal of V. P. Gottschall.

Superior Court of Pennsylvania.

Argued May 15, 1984.

Filed Sept. 7, 1984.

Reargument Denied Nov. 9, 1984.

V. Gottschall, Pittsburgh, in pro. per.

Donald C. Winson, Pittsburgh, for appellee.

Before CAVANAUGH, POPOVICH and HESTER, JJ.

HESTER, Judge:

Appellant, as both named party-plaintiff and counsel of record for the class of plaintiff shareholders, instituted a class action against his former employer, Jones & Laughlin Steel Corporation (hereinafter referred to as "J & L"), and five individuals who were officers of J & L and/or its parent. Appellant was an attorney for J & L from 1969 until his termination in 1979. From 1971 through 1979 he was an Assistant Secretary of J & L and from 1976 through 1979 he was an Assistant General Counsel of J & L. Appellant had responsibility for J & L's compliance with securities law.

Appellant, at the time this suit was initiated, October 29, 1980, was a preferred shareholder in J & L along with his two children. Appellant alleges in this class action, inter alia, appellees depressed the price of the preferred stock, failed to disseminate information and issued erroneous material information to the class.

As both plaintiff and counsel, appellant subsequently filed another lawsuit against J & L requesting the involuntary dissolution of J & L pursuant to § 2107 of the Pennsylvania Business Corporation Law. 15 P.S. § 1001 et seq.

In both suits appellees petitioned the lower court to disqualify appellant as plaintiff and counsel of record. Appellees assert appellant's lawsuits

breach the attorney-client privilege and undermine the Pennsylvania Code of Professional Responsibility, Canons 4 and 9. Canon 4 prohibits an attorney from using client confidences in suits against a former client. Canon 9 prohibits the appearance of impropriety.

In support of its petitions to disqualify appellant, appellees submitted to the trial judge appellees' affidavits and documents from J & L's files to demonstrate that appellant's past representation of J & L was substantially related to the subject matter of the present actions. Subsequently, appellant filed in both suits petitions to disqualify counsel for J & L.

The trial judge scheduled a hearing to resolve the petitions to disqualify and stayed both actions

pending resolutions of the petitions. Concomitantly, the trial judge issued protective orders in both suits to insure the confidentiality of J & L's documentation of their espoused attorney-client privilege until the hearing conducted to resolve the matters set forth in the petitions.

Appellant then appealed the protective orders in both actions. Upon appellant's motion, this court stayed the trial court's hearing to resolve the petitions to disqualify. Appellees moved to quash the appeals on the basis that they were interlocutory. This Court directed the parties to brief and argue the jurisdictional propriety of the appeals together with the merits.

This Court consolidated the appeal in the action requesting involuntary dissolution of J & L (No. 267 Pittsburgh, 1981) with the appeal in the class action (No. 59 Pittsburgh, 1981).

The protective order at No. 59 Pittsburgh, 1981 seals those portions of the record pertaining to appellee's petition to disqualify appellant. Additionally, appellant or any other counsel of record for plaintiffs is prohibited from disclosing the contents of the sealed portions to third parties.[1] At No. 267 Pittsburgh, 1981,

---

[1]The Order on Appeal at No. 59 Pittsburgh, 1981 reads as follows:

AND NOW, to wit, this 30 day of December, 1980, upon consideration of defendant's December 29, 1980 Motion, it is hereby ordered that, until further order of court: (1) defendants' Petition for Disqualification, the Affidavit of D.T. Kalil with attached exhibits, the Affidavit of J.P. Kelly and defendants' Brief supporting its Petition for Disqualification as well as any responsive proceedings relating to

the order prohibits disclosure to third parties, but excepts potential counsel for appellant who agree to be bound by the order, however, written notice must be given to appellees before appellant consults with proposed counsel.[2]

---

defendants' Petition for Disqualification be kept confidential and under seal such that they are not made part of the public record in this case, and (2) Mr. Gottschall and any other counsel of record for plaintiff in this action refrain from disclosing to any third party the nature or contents of those parts of the record made confidential by the within order.

By the Court
/s/ Silvestri, J.

[2]The order on Appeal at No. 267 Pittsburgh, 1981 reads as follows:

AND NOW, to wit, this 29th day of January, 1981, upon consideration of the January 29, 1981 Motion filed by Jones and Laughlin Steel Corporation ("J & L"), it is hereby ordered that, until further order of court: (1) J & L's Petition for Disqualification of Mr. Gottschall, the Affidavits of D.T. Kalil and J.P. Kelly with attached exhibits and J & L's Brief supporting its Petition for Disqualification of Mr. Gottschall, be kept confidential and under seal such that they are not made part of the public record in this case

Appellant argues the protective orders are final, collateral and injunctive, and therefore, this Court has subject matter jurisdiction to hold the orders are a restraint on appellant's First Amendment rights and his right to secure counsel.

---

and (2) Mr. Gottschall and any other counsel of record for Mr. Gottschall in this action refrain from disclosing to any third party the nature or contents of those parts of the record made confidential by the within order; provided, that Mr. Gottschall and any other counsel of record for plaintiff in this action may disclose the nature or contents of those parts of the record made confidential by this order if (i) such disclosure is limited to an attorney being consulted for purposes of possibly becoming additional counsel of record for plaintiff in this action, (ii) such disclosure is made only after prior written notice to counsel of record for J & L of the name and address of the attorney to whom such disclosure is proposed to be made and (iii) such disclosure is made only to an attorney who is not presently involved in any other litigation concerning J & L and who agrees to be bound by the terms of this order.

By the Court
/s/ Silvestri, J.

We cannot agree. Appellate jurisdiction attaches only to "final orders", 42 Pa.C.S.A. §§ 702, 742, and in determining what constitutes a final order we consider the principles set forth by the United States Supreme Court in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and by the Pennsylvania Supreme Court in Piltzer v. Independence Federal Savings and Loan Assn., 456 Pa. 402, 319 A.2d 677 (1974) and Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1978).

A final order is one which ends the litigation, or alternatively, disposes of the entire case. Piltzer, supra. The protective orders do not preclude appellant from further litigating his actions in the lower court, but rather, provide safeguards

necessary to protect appellees' asserted attorney-client privilege pending appellees' actual proof of the existence of that privilege.

We must consider the practical ramifications of the orders to ascertain if they terminate appellant's actions. Conaway v. 20th Century Corp., 491 Pa. 189, 420 A.2d 405 (1980); Gordon v. Gordon, 293 Pa. Super.Ct. 491, 439 A.2d 683 (1981), aff'd. mem., 498 Pa. 570, 449 A.2d 1378 (1982).

In Conaway, the trial court sustained defendant's preliminary objections in the nature of a demurrer to plaintiff's complaint. The trial court dismissed plaintiff's action, and sustained the demurrer "in accordance with the above opinion." The above

opinion invited, via "reconsideration", the plaintiff to add to the record. The Pennsylvania Supreme Court stated:

> Hence, whatever finality the court expressed on the one hand, it destroyed on the other, and the practical ramification of the order of September 29, 1975 was not to put Conaway out of court. Accordingly, the order of September 29, 1975 was not final. [emphasis added].

491 Pa. at 197, 420 A.2d at 409.

Instantly, the orders restrict for a limited period and to a limited class appellant's dissemination of the protected information. Appellant still has the ability to litigate the merits of the petitions to disqualify. The orders sufficiently insure appellant's right to secure counsel. Appellant may in fact be disqualified based on the protected information, but that is the

issue to be decided at the pending lower court hearing on the petitions to disqualify.

> The appealability of an order or judgment must be determined as of the time the appeal therefrom is filed. If the order appealed from is interlocutory, the appeal may be quashed immediately upon motion. See: Pa.R.A.P. 1972. In such cases, the lack of jurisdiction to entertain an appeal from the interlocutory order cannot be corrected by subsequent events in the same action.

Praisner v. Stocker, 313 Pa. Super.Ct. 332, 343, n. 4, 459 A.3d 1255, 1261, n. 4 (1983).

Appellant propounds that his communication with the press, other attorneys or experts, etc., limited by the protective orders, is a matter which is separable from and collateral to the main cause of actions and therefore, the orders are final as determined by the

three-part test announced in Cohen v. Beneficial Industrial Loan Corporation, supra.

> In Cohen, the issue was the appealability of an order, collateral to a stockholders' derivative action, which denied a petition to require the plaintiff to post security to cover defendant's expenses and counsel fees if plaintiff's action proved unsuccessful. The Supreme Court held the order appealable because the claim adjudicated was "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Praisner v. Stocker, 313 Pa.Super.Ct. at 342, 459 A.2d at 1261 (quoting Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. at 546, 69 S.Ct. at 1225, 93 L.Ed.2d at 1536).

Appellant's interpretation of the protective orders is too restrictive. Appellant considers only the fact that information is placed under seal and

that his ability to disseminate that information is restricted. Appellant fails to acknowledge the significance the information may have to the underlying actions. The information placed under seal has the potential to determine the ultimate issues of liability, or alternatively to disqualify appellant from pursuing the merits of the actions. Therefore, the orders directly relate to the main causes of action.

The Cohen test is applicable only to determine the appealability of an order which is collateral to the main action. Praisner, supra. Since appellant fails to satisfy the first requirement in the three-part Cohen test, it is not necessary to consider herein the remaining two requirements.

Appellant erroneously defines the protective orders as injunctions and therefore, appealable as of right pursuant to Pa.R.A.P. 311(a)(4). Appellant relies on Rosenzweig v. Factor, 457 Pa. 492, 327 A.2d 36 (1974), as authority for his position that the protective orders maintain the status quo and therefore, are special injunctions.

The lower court in Rosenzweig, Id., failed to follow the mandatory procedure before issuing the special injunction directing appellant to deposit the controverted funds in escrow. Although ample time existed, the injunction was issued without a hearing or prior notice, and without a showing of irreparable injury.

Appellant suffers no irreparable injury. This Court's jurisdiction cannot automatically be conferred because unlike the funds in Rosenzweig, Id., the sealed information will remain available for future dissemination if appellant prevails on appellees' petitions to disqualify appellant. Appellant cannot complain that the lapse of time will nullify the importance of the protected information, as he requested the stay of the hearing on the petitions to disqualify.

The protective orders are not injunctions as they acknowledge the continuing attorney-client privilege. They are a means to avoid potential contravention of the policies underlying Canons 4 and 9 of the Pennsylvania Code of Professional Responsibility.

Since this Court lacks subject matter jurisdiction, we cannot consider the merits of these consolidated appeals.

Orders affirmed. Appeals quashed.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

V. P. GOTTSCHALL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. GD80-32049
	)	
JONES & LAUGHLIN STEEL CORPORATION,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

SILVESTRI, J.

The plaintiff filed an appeal on February 24, 1981 from an order of this court dated January 29, 1981. Said order was a protective order sealing a portion of the record in the case and enjoining the plaintiff and any counsel of record from discussing the sealed portions of the record with any third party, with the exception of a limited class of attorneys, in order to permit the plaintiff to proceed with the preparation and trial of the case. For

reasons which are not apparent, although the order was entered January 29, 1981 and an appeal was timely taken, the record was not forwarded to the Superior Court of Pennsylvania. With the filing of this memorandum opinion, this court has directed that the Prothonotary of the Court of Common Pleas of Allegheny County to forward the record of this case to the Superior Court.

This court did not file an opinion in the first instance by reason of its opinion that the order was interlocutory and not appealable.

Notwithstanding the opinion of this court that the order is interlocutory, it appearing from the record in the proceedings that the plaintiff, V. P. Gottschall, immediately prior to the filing of the within proceedings, was Assistant General Counsel of the

defendant and participated directly in the matters forming the basis of the within lawsuit together with the other allegations of the defendant's motion to seal part of the record, all of which this court found is credible, the order of January 29, 1981 was properly entered.

Dated this 21st day of November, 1983.

IN THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

V. P. Gottschall, et al.	)	
	)	
Appellants	)	
	)	
vs.	)	No. 59
	)	Pittsburgh,
	)	1981
JONES & LAUGHLIN STEEL CORPORATION, et al.	)	
	)	
	)	
Appellees	)	

PETITION FOR STAY OF PROCEEDINGS

AND NOW comes plaintiff-appellant, V. P. Gottschall, and in support of the Petition for a Stay of Proceedings in the action pending in the Allegheny County Court of Common Pleas at GD80-26963 says:

1. On January 9, 1981 an appeal was taken from an Order (a copy of which is attached hereto as Exhibit 1) signed by Judge Silvestri on December 30, 1980

in the case pending at GD80-26963. The appeal has been docketed as No. 59 Pittsburgh 1981.

2. By a letter dated March 26, 1981, Judge Silvestri notified the parties that a hearing would be held, on the reciprocal motions for disqualification which were filed in the case, on April 31, 1981.

3. On April 9, 1981 in a status conference, Judge Silvestri told the parties his secretary had made a mistake in the letter of March 26, 1981 and the hearing would be held at 9:30 a.m. on April 14, 1981.

4. The right to consult freely with counsel and other experts (the denial of which is the basis of the appeal) is a fundamental precept of justice and the lower court should not be permitted to proceed until this Court

can consider the propriety of the order. At that status conference the attorney for plaintiff-appellant voiced his objection to proceeding before the determination of the appeal to the Superior Court. Counsel for defendants-appellees asserted that the hearing scheduled for April 14, 1981 would be permissible because the appeal deals only with the order denying plaintiffs' access to counsel.

6. Judge Silvestri stated that the hearing would be held on April 14, 1981 and he would wrestle with whatever problems that might entail at that time.

7. Plaintiffs aver that formal application to Judge Silvestri is not practicable.

8. Because the order from which an appeal was taken was entered on the basis of ex parte presentations in the

Judge's Chambers and there have been no formal hearings, there is no record as such. As of this date Judge Silvestri has not, as required by Rule 1925, filed a statement of the reasons for the order.

Respectfully submitted,

BY s/ V. P. Gottschall
V. P. Gottschall
Attorney for plaintiff-appellant
9351 Tanbark Drive
Pittsburgh, PA 15237

IN THE SUPERIOR COURT OF
PENNSYLVANIA
Sitting at Pittsburgh

V. P. Gottschall, et al.	)	
	)	
Appellants	)	
	)	
vs.	)	No. 59
	)	Pittsburgh,
	)	1981
JONES & LAUGHLIN STEEL CORPORATION, et al.	)	
	)	
	)	
Appellees	)	

ORDER OF COURT

AND NOW, to wit, this 13th day of April, 1981, upon consideration of appellants' petition for stay and appellee's answer thereto, inasmuch as an appeal is pending in this matter in this Court and none of the exceptions of Pa. R.A.P. 1701(b) or (c) appear to apply, the hearing scheduled in this matter before the Honorable Judge Silvestri Silvestri on April 14, 1981, is hereby stayed.

Nothing in this order shall be construed as an indication that this Court deems the order appealed is final and appealable.

PER CURIAM

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

V. P. GOTTSCHALL	)	
	)	
Plaintiff,	)	
	)	
vs.	)	GD80-32049
	)	
JONES & LAUGHLIN STEEL CORPORATION,	)	
	)	
	)	
Defendant	)	

AND NOW, to wit, this 29th day of January, 1981, upon consideration of the January 29, 1981 Motion filed by Jones and Laughlin Steel Corporation ("J & L"), it is hereby ordered that, until further order of court: (1) J & L's Petition for Disqualification of Mr. Gottschall, the Affidavits of D.T. Kalil and J.P. Kelly with attached exhibits and J & L's Brief supporting its Petition for Disqualification of Mr. Gottschall, be kept confidential and

under seal such that they are not made part of the public record in this case and (2) Mr. Gottschall and any other counsel of record for Mr. Gottschall in this action refrain from disclosing to any third party the nature or contents of those parts of the record made confidential by the within order; provided, that Mr. Gottschall and any other counsel of record for plaintiff in this action may disclose the nature or contents of those parts of the record made confidential by this order if (i) such disclosure is limited to an attorney being consulted for purposes of possibly becoming additional counsel of record for plaintiff in this action, (ii) such disclosure is made only after prior written notice to counsel of record for J & L of the name and address of the attorney to whom such disclosure

is proposed to be made and (iii) such disclosure is made only to an attorney who is not presently involved in any other litigation concerning J & L and who agrees to be bound by the terms of this order.

By the Court

/s/ Silvestri, J.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

V. P. Gottschall, et al.	)	
	)	
Plaintiffs	)	
	)	
vs.	)	GD80-26963
	)	
	)	
JONES & LAUGHLIN STEEL CORPORATION, et al.	)	
	)	
	)	
Defendants	)	

AND NOW, to wit, this 30 day of December, 1980, upon consideration of defendant's December 29, 1980 Motion, it is hereby ordered that, until further order of court: (1) defendants' Petition for Disqualification, the Affidavit of D.T. Kalil with attached exhibits, the Affidavit of J.P. Kelly and defendants' Brief supporting its Petition for Disqualification as well as any responsive proceedings relating to

defendants' Petition for Disqualification be kept confidential and under seal such that they are not made part of the public record in this case, and (2) Mr. Gottschall and any other counsel of record for plaintiff in this action refrain from disclosing to any third party the nature or contents of those parts of the record made confidential by the within order.

By the Court

/s/ Silvestri, J.

Exhibit A

J&L
STEEL

NEWS RELEASE

P- -76

July 14, 1976

PITTSBURGH, Pa. -- Jones & Laughlin Steel Corporation has announced three personnel appointments in its law department.

Victor P. Gottschall, J. Peter Kelly and Thaddeus A. Zalenski have been appointed to the newly created positions of assistant general counsel.

Gottschall joined J&L as an attorney in 1969 and was named general attorney and assistant secretary in 1971.

A native of Pittsburgh, he attended Harvard University and received a

bachelor of arts degree in government in 1963 and a J.D. degree in law in 1966.

He is a member of the American Bar Association, the Pennsylvania Bar Association and the Allegheny Bar Association.

Kelly began his J&L career in 1963 as an industrial engineer trainee and has held various industrial engineering positions. In 1971 he became a legal assistant, in 1972 he was named attorney and in 1974 he was appointed general attorney for the legal division.

A native of Easton, Massachusetts, he received a bachelor of arts degree in chemistry from Harvard University in 1963 and a J.D. degree from Duquesne University in 1972.

He is a member of the Harvard University Society of Chemists, the Allegheny Bar Association and the Labor Law Section of the American Bar Association.

Zalenski joined J&L in 1966 as an attorney.

A native of East Vandergriff, he received a bachelor of science degree oil petroleum and natural gas engineering from Pennsylvania State University in 1959 and an L.L.B. degree from Georgetown University in 1966.

He is a member of the Pennsylvania Bar Association.

# # #

Exhibit B

POST-GAZETTE

December 30, 1980

Shareholder sues
to dissolve J&L

Former Jones & Laughlin Steel Corp. attorney Victor P. Gottschall petitioned for the dissolution of the firm yesterday, arguing that its owners are not running it as a separate firm.

In a petition filed in Common Pleas Court, Gottschall suggested that a receiver be appointed for the steel firm's assets and that holders of preferred stock receive $100 for each of their shares. He is the owner of 20 shares.

Gottschall's court petition was directed primarily against Dallas-based LTV Corp.-which owns all the stock of

Jones & Laughlin Industries, the owner of all J&L common stock.

As sole beneficial owner of J&L common stock, LTV "has demonstrated its desire to eliminate J&L as a separate corporation both by causing J&L to be run as a division, rather than a separate corporation, and by trying to eliminate or drastically curtail trading in the publicly held stock of J&L" Gottschall charged.

The last charge was a repeat of one made by Gottschall against LTV in suits filed in September and October.

Exhibit C

AFFIDAVIT OF V.P. GOTTSCHALL

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF ALLEGHENY)

Promptly after the entry of Judge Silvestri's Order of December 30, 1980 and at various times thereafter, I contacted attorneys in an effort to secure counsel in both that case (now on appeal at No. 59 Pittsburgh 1981) and later the case now on appeal at No. 267 Pittsburgh 1981. The reaction was that the orders were clearly improper and no one would agree to be bound by the terms of the orders. The most frequent "advice" was that I call a press conference, disclose the documents, and see if Jones & Laughlin Steel Corporation or Judge Silvestri would do

anything. Although a proceeding for contempt would have directly raised the First Amendment issue, I chose not to follow that advice. While there may be lawyers willing to accept the terms of the order and represent me I have not found them and believe they would be less "qualified" than those who urged me to violate the orders to clearly focus the issue.

s/ V.P. Gottschall

V. P. Gottschall

Sworn to and subscribed before
me this 20th day of September, 1984.

s/Rose Ann Mulkern

Notary Pubic

ROSE ANN MULKERN
Pittsburgh, Allegheny County, Pa.
My Commission Expires Mar. 18, 1985

Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-68

In the Supreme Court of the United States

October Term, 1985

V. P. GOTTSCHALL and V. P. GOTTSCHALL AS CUSTODIAN under the Uniform Gifts to Minors Act for NICHOLAS P. GOTTSCHALL and TERESA GOTTSCHALL, Minors, all in their own behalf, and for all others similarly situated,

Petitioners,

vs.

JONES & LAUGHLIN STEEL CORPORATION, Paul Thayer, Raymond A. Hay, Thomas C. Graham, G. E. Smith, and D. T. Kalil,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

Brief In Opposition To Petition For A Writ Of Certiorari

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August 9, 1985

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should issue a Writ of Certiorari where there has been no final judgment or decree by any Pennsylvania appellate court regarding the protective orders, as required by 28 U.S.C. § 1257(3).

2. Whether this Court should issue a Writ of Certiorari where the protective orders are interlocutory and not final.

3. Whether this Court should issue a Writ of Certiorari where the protective orders conform with this Court's recent ruling in *Seattle Times Co. v. Rhinehart,* 104 S. Ct. 2199 (1984).

CORPORATE LISTING

In 1981, Jones & Laughlin Steel Corporation and Youngstown Sheet and Tube Company merged into Jones & Laughlin Steel, Incorporated ("J&L"). In December, 1984, J&L merged with Republic Steel Corporation, a New Jersey corporation, which consolidated entity thereupon changed its name to LTV Steel Company, Inc. LTV Steel Company, Inc. is a wholly-owned subsidiary of The LTV Corporation. Listed in Appendix A to this brief is respondent's parent corporation, its subsidiary corporations and all corporations with which it is affiliated.

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No. 85-68

In the Supreme Court of the United States

October Term, 1985

V. P. GOTTSCHALL, et al.,

Petitioners,

v.

JONES & LAUGHLIN STEEL CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF PENNSYLVANIA

Brief In Opposition To Petition For A Writ Of Certiorari

STATEMENT OF JURISDICTION

This Court should refuse to exercise jurisdiction over this matter because there has been no final judgment or decree by any Pennsylvania appellate court, as required by 28 U.S.C. § 1257(3). In addition, this Court should refuse to exercise jurisdiction over this matter because, as held by

the Superior Court of Pennsylvania, the two protective orders are interlocutory and not final.

COUNTERSTATEMENT OF THE CASE

Respondents have set forth a counterstatement of the case because the statement of the case set forth by petitioners is inaccurate as well as incomplete.

A. Background

Petitioner V. P. Gottschall ("Mr. Gottschall") was admitted to practice before the Supreme Court of Pennsylvania in 1966. Beginning in 1969 he was employed as an attorney by Jones & Laughlin Steel Corporation ("J&L") and was responsible, *inter alia*, for securities matters until the termination of his active employment in January 1979. From 1976 to the end of his employment with J&L, Mr. Gottschall was an Assistant General Counsel of J&L, and from 1971 through 1979 he was an Assistant Secretary of J&L. Since leaving J&L, Mr. Gottschall has filed a total of six lawsuits against his former client, J&L, including the two actions which underlie Mr. Gottschall's petition.[1]

The nature and extent of Mr. Gottschall's attorney-client relationship with J&L which prompted the protective orders involved in Mr. Gottschall's petition have already been considered by a federal district court in *Edward L. Forstall, et al. v. Jones & Laughlin Steel Corporation, et al.*, Civil Action No. 80-1020 (United States District Court for the Western District of Pennsylvania). In that securities class action involving many of the same allegations involved in the present actions, Mr. Gottschall,

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[1]Summaries of the four other lawsuits which Mr. Gottschall has filed against J&L and which do not underlie Mr. Gottschall's petition are contained in Appendix B to this brief.

an originally named individual plaintiff, was disqualified from prosecuting the action pursuant to Canons 4 and 9 of the Code of Professional Responsibility. The court ruled that Mr. Gottschall's prior representation of J&L as an attorney had a substantial relationship to the matters alleged in his complaint in that action.[2] Mr. Gottschall did not appeal from his disqualification in that action.

B. Procedural History Of The First Protective Order

On October 29, 1980, Mr. Gottschall, as both named class plaintiff and counsel of record, filed a class action against J&L and five individuals who were officers of J&L and/or its parent, The LTV Corporation, in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 80-26963. In that action, Mr. Gottschall requests, *inter alia*, that a special investigator be appointed to conduct a "thorough review of the situation" at J&L. On December 30, 1980, J&L filed a petition to disqualify Mr. Gottschall as plaintiff and counsel of record pursuant to Canons 4 and 9 of the Code of Professional Responsibility.

In support of its petition, J&L filed affidavits of facts and documents from its files to show the substantial relationship between Mr. Gottschall's prior representation of J&L and the allegations in his complaint. Judge Silvestri S. Silvestri, the lower court judge, stayed the action pending resolution of the petition to disqualify and entered a protective order sealing those portions of the record pertaining to J&L's petition and prohibiting disclosure of the contents of the sealed portions by Mr. Gottschall to third parties.

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[2]A copy of the order and accompanying opinion dated March 24, 1981 which disqualified Mr. Gottschall is attached hereto as Appendix C.

This order is the first of the two protective orders involved in Mr. Gottschall's petition.

On January 9, 1981, Mr. Gottschall filed an appeal from this first protective order to the Superior Court of Pennsylvania at No. 59 Pittsburgh 1981. Judge Silvestri scheduled a hearing on the petition for disqualification for April 14, 1981. On April 13, 1981, the day before the disqualification hearing, Mr. Gottschall requested, and the Superior Court granted, a stay of the hearing. On August 7, 1981, J&L moved to quash Mr. Gottschall's appeal on the ground that it was interlocutory. By order dated January 12, 1982, the Superior Court directed the parties to brief and argue the jurisdictional propriety of the appeal with the argument on the merits of the appeal.

C. Procedural History Of The Second Protective Order

On December 29, 1980, Mr. Gottschall, as both plaintiff and counsel of record, filed another lawsuit against J&L at No. GD 80-32049 in the Court of Common Pleas of Allegheny County, Pennsylvania. In that action, Mr. Gottschall requests the involuntary dissolution of J&L pursuant to Section 1107 of the Pennsylvania Business Corporation Law. On January 29, 1981, J&L filed a petition to disqualify Mr. Gottschall on the same basis as in GD 80-26963 and also filed affidavits of facts and documents from its files to show the substantial relationship between Mr. Gottschall's prior representation of J&L and the allegations in his petition for involuntary dissolution.

Judge Silvestri stayed the action pending resolution of the petition to disqualify and entered a protective order sealing those portions of the record pertaining to J&L's petition and prohibiting disclosure of the contents of the sealed portions by Mr. Gottschall to third parties. This is

the second of the two protective orders involved in Mr. Gottschall's petition.

On February 24, 1981, Mr. Gottschall took an appeal from this second protective order to the Superior Court at No. 467 Pittsburgh 1981. On April 13, 1981, the Superior Court granted Mr. Gottschall's request for a stay, thus preventing the lower court from conducting a hearing on J&L's petition to disqualify which had been scheduled for April 14, 1981. On August 7, 1981, J&L moved to quash this appeal on the ground that it was interlocutory. By order dated November 18, 1982, the Superior Court directed the parties to brief and argue the jurisdictional propriety of the appeal with the argument on the merits of the appeal. On July 14, 1983, the Superior Court ordered the consolidation of the appeal at No. 467 Pittsburgh 1981 with the appeal at No. 59 Pittsburgh 1981.

D. Procedural History of Appeals On The Protective Orders After Consolidation

In May, 1984, the Superior Court of Pennsylvania heard argument on Mr. Gottschall's appeals and on J&L's motion to quash the appeals as interlocutory. On September 7, 1984, the Superior Court quashed the appeals on the ground that the protective orders were not final so that the court lacked subject matter jurisdiction. *V. P. Gottschall, et al. v. Jones & Laughlin Steel Corporation, et al.*, 482 A.2d 979 (Pa. Super. 1984).

On September 21, 1984, Mr. Gottschall filed a petition for reargument in the Superior Court which was denied, *per curiam,* on November 9, 1984. On December 3, 1984, Mr. Gottschall filed a petition for allowance of appeal with the Supreme Court of Pennsylvania which was also denied, *per curiam,* on April 16, 1985. On July 11, 1985, Mr.

Gottschall filed a Petition for a Writ of Certiorari which is presently pending before this Court.

SUMMARY OF ARGUMENT

There are at least three reasons why this Court should deny the pending Petition for a Writ of Certiorari: (i) there has been no final judgment or decree by any Pennsylvania appellate court, as required by 28 U.S.C. § 1257(3); (ii) the protective orders are interlocutory and not final; and (iii) the protective orders in question conform with this Court's recent ruling in *Seattle Times Co. v. Rhinehart,* 104 S. Ct. 2199 (1984).

ARGUMENT

A. This Court Should Not Issue A Writ Of Certiorari Because There Has Been No Final Judgment Or Decree By Any Pennsylvania Appellate Court, As Required By 28 U.S.C. § 1257(3).

Under 28 U.S.C. § 1257(3), the Supreme Court of the United States can review "... final judgments or decrees rendered by the highest court of a State in which a decision could be had ..." Where the highest state court in which a decision could be had has not rendered a final judgment or decree, this Court has declined to exercise certiorari jurisdiction. *See, e.g., Gillette Co. v. Minor,* 459 U.S. 86 (1982); *Shaffer v. Heitner,* 433 U.S. 186 (1977); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945).

In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975) this Court reiterated this rule of finality but set forth four distinct exceptions to it. Because the protective orders

in question are not within any of the four exceptions enunciated in the *Cox* case, they fail to meet the jurisdictional requirements of 28 U.S.C. § 1257(3).

The first exception in the *Cox* case is comprised of cases in which the federal claim to be reviewed on interlocutory appeal is, as a practical matter, "conclusive over the case" because the party asserting the claim has no other grounds upon which to rest his case. 469 U.S. at 479. The protective orders do not fall within this first exception because Mr. Gottschall has other grounds upon which to rest his case to obtain the unsealing of the record, *i.e.* demonstrating that there is no substantial relationship between the underlying actions and his prior representation of J&L.

The second exception in the *Cox* case is comprised of those cases in which "the federal issue finally decided by the highest court in the state will survive and require decision regardless of the outcome of future-state court proceedings." 420 U.S. at 480. The protective orders do not fall within this exception because the future state court proceedings regarding Mr. Gottschall's disqualification may obviate the protective orders. If Mr. Gottschall is not disqualified, the court presumably will unseal the affidavits and supporting documents and the First Amendment issue will be resolved in favor of Mr. Gottschall.

The third exception in the *Cox* case is comprised of those cases in which subsequent review of a fully adjudicated claim will be impossible regardless of the ultimate outcome of further proceedings on the merits still to be conducted in the state courts. As Justice White explained, "In these cases, if the party seeking interim review ultimately prevails on the merits the federal issue will be mooted; if he were to lose on the merits, however, the

governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481. The protective orders do not fall within this third exception because if Mr. Gottschall were disqualified, he could appeal to the Pennsylvania Appellate Courts at the conclusion of the action for review of all issues, including any First Amendment issue, he may assert with respect to the protective orders.

The fourth exception in the *Cox* case permits interlocutory review when: (i) "reversal of the state court on the federal issue would be preclusive of any further litigation in the relevant cause of action"; and (ii) failure to consider the court decision immediately "might seriously erode federal policy." 420 U.S. at 482-83. The protective orders do not fall within this fourth exception because their dissolution would not preclude further litigation of either the underlying cause of action or the motion to disqualify. Moreover, this Court's refusal to consider them at this time would not seriously erode any federal policy because, as discussed below, they were entered in conformity with this Court's recent decision in *Seattle Times Co. v. Rhinehart,* 104 S. Ct. 2199 (1984).

In addition to the absence of a "final order" under 28 U.S.C. § 1257(3), no Pennsylvania appellate court has ruled on the merits of the protective orders, as required by 28 U.S.C. § 1257(3). The Superior Court held that the appeals were interlocutory and the Supreme Court of Pennsylvania declined to review the decision of the Superior Court.

Since there is no final order and no determination on the merits by the Pennsylvania courts, this Court should not exericise its jurisdiction under 28 U.S.C. § 1257(3). By refusing to exercise jurisdiction, this Court would not

undermine "harmonious state-federal relations" and would foster the long-recognized salutary principles of comity and federalism. *See Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945); *Republic Gas Co. v. Oklahoma,* 334 U.S. 62 (1948); *Younger v. Harris,* 401 U.S. 37 (1971).

B. This Court Should Not Issue A Writ of Certiorari Because The Protective Orders Are Interlocutory And Not Final.

This Court has recognized that the lack of finality of an order "of itself alone" furnishes sufficient ground for the denial of a writ of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). *See also, Estelle v. Gamble,* 429 U.S. 97, 114 (1976) (Mr. Justice Stevens in dissent referred to "the Court's normal practice of denying interlocutory review."). Since the protective orders are not final or appealable under the collateral order doctrine, this Court should deny Mr. Gottschall's petition.

1. The Protective Orders Are Not Appealable As Final Orders.

Subject to certain exceptions not here relevant, appellate jurisdiction generally extends only to appeals from "final decisions" of the lower courts. 28 U.S.C. § 1291; 42 Pa. C.S.A. § 722; *see also, Andrews v. United States,* 373 U.S. 334 (1963); *Cobbledick v. United States,* 309 U.S. 323 (1940). A final decision is one which ends the litigation on the merits and leaves nothing for the court to do but enter the judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467 (1978); *Catliv v. United States,* 324 U.S. 229 (1945).

The protective orders in question do not end the litigation; they merely seal that part of the record which was offered to establish J&L's attorney-client privilege. The

protective orders only prevent Mr. Gottschall from improperly disclosing the confidential information filed in connection with J&L's petitions to disqualify Mr. Gottschall, and they merely establish the threshold procedures which the lower court correctly found to be necessary to protect the asserted attorney-client privilege pending the determination of J&L's petitions to disqualify. Hence, to allow Mr. Gottschall's appeals to be considered on the "merits" at this time would unquestionably frustrate the policies underlying the finality requirement for the appealability of orders, *i.e.*, to preclude piecemeal determinations with the consequent protraction of litigation. *See Firestone Tire & Rubber Co. v. Risjord,* 499 U.S. 368 (1981).

Unless the lower court may place under seal evidence offered to support an asserted claim of attorney-client privilege or until the lower court determines the issues raised by the asserted privilege, one would, in effect, be forced to waive the attorney-client privilege in the process of asserting it. Thus, the interim relief of a protective order pending determination of a petition to disqualify based on Canons 4 and 9 is proper and interlocutory.

2. *The Protective Orders Are Not Appealable Under The Collateral Order Doctrine.*

Under the collateral order doctrine, as established by this Court, an order is considered final and appealable only if (i) it conclusively determines the disputed question; (ii) it resolves an important issue completely separate from the disputed question; and (iii) it cannot be effectively reviewed on appeal from a final judgment. *Richardson-Merrill, Inc. v. Koller,* 53 U.S.L.W. 4773 (June 18, 1985); *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368 (1981); *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978).

Here, the protective orders meet none of the three requirements of the collateral order doctrine.

First, the protective orders do not conclusively determine the disputed question. Rather, they are interim orders entered by the lower court to protect confidentiality pending a determination of J&L's petition to disqualify Mr. Gottschall. The conclusive determination of the propriety of the protective orders would have occurred at the hearing on the petition to disqualify which was aborted by Mr. Gottschall's request for a stay of the hearing.

Second, the protective orders do not resolve an important issue completely separate from the disputed question. Rather, the orders merely seal those portions of the record relating to J&L's petition to disqualify Mr. Gottschall and prohibit disclosure of the sealed record. Because the complaints filed by Mr. Gottschall in the underlying actions concern matters upon which he worked while an attorney for J&L, the protective orders directly relate to the main cause of action.

Third, the protective orders can be effectively reviewed on appeal from a final judgment. After final judgments have been entered, Mr. Gottschall can appeal the lower court's protective orders and, if successful, unseal the record and disclose to third parties the information he obtained as an attorney for J&L. Deferring consideration of the orders until such time would afford this Court as well as the Pennsylvania appellate courts the opportunity to consider these orders in light of a fully developed factual record which would outline the confidences that J&L reposed in its former attorney, Mr. Gottschall.[3]

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[3]The protective orders are not appealable as injunctions. *Clark v. Lomas & Nettleton Financial Corporation*, 581 F.2d 516 (5th Cir. 1978);

(Continued on next page)

Finally, this Court has recently held that "orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases, are not collateral orders subject to appeal as 'final judgments' within the meaning of 28 U.S.C. § 1291." *Richardson-Merrill, Inc. v. Koller,* 53 U.S.L.W. 4775 (June 18, 1985). Since an order disqualifying Mr. Gottschall would not be collaterally appealable the two protective orders which were merely interim orders entered to protect confidentiality *pending* a disqualification hearing, *a fortiori*, are not appealable under the collateral order doctrine.

C. This Court Should Not Issue A Writ Of Certiorari Because The Protective Orders Conform With This Court's Recent Ruling In *Seattle Times Co. v. Rhinehart.*

This Court should deny Mr. Gottschall's petition not only on the basis of the absence of a final decision by the appellate courts of Pennsylvania and the interlocutory nature of the protective orders, but also on the basis of *Seattle Times Co. v. Rhinehart,* 104 S. Ct. 2199 (1984).

In the *Seattle Times* case, this Court noted that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. Moreover, this Court recognized that because pretrial protective orders do not compromise the First Amendment rights of a restricted party as much as other restraints might, and also because litigants and third parties who may have to produce confidential information have protectable privacy

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(Continued)
International Products Corporation v. Koons, 325 F.2d 403 (2nd Cir. 1963).

interests, the trial court has "substantial latitude" to fashion protective orders.

In the underlying actions, Judge Silvestri properly entered the protective orders in order to preserve J&L's attorney-client privilege and to avoid contravention of the policies underlying Canons 4 and 9 of the code of Professional Responsibility. In its petitions to disqualify Mr. Gottschall, J&L set forth confidential information to show that Mr. Gottschall's prior representation of J&L was substantially related to Mr. Gottschall's allegations in the underlying actions.[4] The protective orders were interim only and entered pending a hearing which Judge Silvestri promptly scheduled.[5] If Judge Silvestri had refused to enter the protective orders, J&L would have been placed in the anomalous position of being required to sacrifice confidentiality in order to assert its right to confidentiality and of being required to waive its attorney-client privilege in order to preserve the privilege.

The refusal by courts to sanction such an anomaly was recognized by the Court of Appeals for the District of Columbia Circuit in *United States v. Hubbard,* 650 F.2d 293 (D.C. Cir. 1980). In the *Hubbard* case, the court

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[4]The showing of such a "substantial relationship" is the legal test for disqualification. *See Richardson v. Hamilton International Corporation,* 469 F.2d 1382 (3rd Cir. 1972). The merits of J&L's assertion of the prior attorney-client relationship to disqualify Mr. Gottschall is demonstrated by the fact that Mr. Gottschall was disqualified by a federal court from prosecuting a similar suit against J&L. *See* Appendix C attached hereto.

[5]Like the *Seattle Times* case, which involved the issue of the possible dissemination of information involuntarily produced by plaintiffs through discovery, the information covered by the protective orders was also produced involuntarily by J&L as a result of lawsuits filed by Mr. Gottschall, an attorney, against his former client, J&L.

reversed the lower court's unsealing of confidential documents where, as here, the documents were being used for the sole purpose of demonstrating that their seizure was unlawful and that their confidentiality should be maintained. In holding that it was improper to require sacrifice of confidentiality in order to vindicate confidentiality, the court declared:

> It would be ironic indeed if one who contests the lawfulness of a search and seizure were always to acquiesce in a substantial invasion of these interests simply to vindicate them.

650 F.2d at 321. *Cf. Simmons v. United States,* 390 U.S. 377 (1968).

Further, Mr. Gottschall can hardly complain of any delay resulting from appeals or the fact that he did not cross-examine anyone with respect to the underlying actions. It was Mr. Gottschall, not J&L, who obtained the stay from the Pennsylvania Superior Court one day before the scheduled disqualification hearing, which prevented the lower court from proceeding with a determination with respect to the protective orders. By filing the motion to stay, Mr. Gottschall precluded the lower court from establishing a record as to the relationship between Mr. Gottschall's prior representation of J&L and the subject matter of the underlying actions.

Finally, Mr. Gottschall's claim that the protective orders somehow inhibit his right to counsel is groundless. First, the orders do not preclude Mr. Gottschall from discussing anything with anyone whom he might consult as potential co-counsel. The protective order in GD No. 80-32049 expressly states that Mr. Gottschall can consult with potential co-counsel and the protective order in GD No.

80-26963 was stipulated to be the same in intent and effect. Second, in both actions, Mr. Gottschall is counsel of record and in Paragraph 12 of his class action complaint against J&L in GD No. 80-26963 Mr. Gottschall represented that he is fully competent to represent the alleged class.

CONCLUSION

In view of the foregoing, respondents respectfully request that this Court deny the pending Petition for a Writ of Certiorari.

Respectfully submitted,

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DONALD C. WINSON

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Counsel for Respondents

APPENDIX A

CORPORATE LISTING

THE LTV CORPORATION

The LTV Corporation
Ashland Corporation
Continental Emsco Company
Corsair Insurance Company Limited
GK Steel corporation
Gulf States Steel Corporation
Investment Bankers, Inc.
Immobiliaria Nueva Icacos, S.A. de C.V.
J&L Empire, Inc.
Empire Iron Mining Partnership
Jones & Laughlin Steel Incorporated
Kentron Saudi Arabia, Inc.
Kingsley International Insurance Ltd.
LTV Aerospace and Defense Company
LTV Education Systems, Inc.
LTV/EGL Holding Company
L-S Electro-Galvanizing Company
LTV Electro-Galvanizing, Inc.
LTV Energy Products Company
LTV Holdings, Inc.
LTV International, N.V.
LTV International Sales Company
LTV Leasing, Inc.
LTV Properties, Inc.
LTV Sales Finance Company
LTV Steel Specialty Products Company
LTV Steel Company, Inc.
LTV Steel Tubular Products Company
Georgia Tubing Corporation
LTVUS, Corp.
THE LTV Corporation (Wyoming)

Lykes Financial Corporation
Lykes Financial Corporation
Lykes Leasing Corporation
Ore Finance Company
RepSteel Overseas Finance N.V.
Republic International Corporation
Sierra Research Corporation
Western Reserve Capital Management, Inc.

LTV AEROSPACE AND DEFENSE COMPANY SUBSIDIARIES

Am General Corporation
LTA International, N.V.
MLRS International Corporation
Sierra Industries, Inc.
Sierra Information Systems Corporation
National Telephone Systems, Inc.
Natel Communication Services, Inc.
Universal Time/Frequency, Inc.
Sierra Research International Corporation
Vought Industries, Inc.
Vought International, Inc.
Vought Overseas, Ltd.
Vought Arabia
Vought Properties, Inc.

LTV ENERGY PRODUCTS COMPANY SUBSIDIARIES

Conensco Limited
Conensco Marine Systems S.A.
Continental Emsco Company C.A.
Petroequip
Continental Emsco Company de Mexico, S.A. de C.V.
Halcorp, Inc.
Elastomeric Actuators, Inc.

Fibercast Company
Juddcorp, Inc.
J. K. Industries, Inc.
LTV Energy Products Company Limited
Nippon Conensco Co., Ltd.
Oil States Offshore Marine, Inc.
Oil States Rubber Co.
Oil States Rubber Co. (U.K.) Limited
Oil States Rubber DISC, INC.
Technical Plastics, Inc.

LTV HOLDINGS, INC. SUBSIDIARIES

NRE Corporation
North River Energy Company
Reomar, Inc.
Chateaugay Corporation
Pineocean Limited
Republic Builders Products Corporation
Republic Buildings Corporation
Republic Container Company
Republic Drainage Products Company
Republic Steel Services Group, Inc.
Hogg Robinson Group, p.l.c.
Republic Steel Services Group, Ltd.
Cedar Hill Management Ltd.
Republic Hogg Robinson IIS (Bermuda) Ltd.
Republic Storage Systems Company

LTV STEEL COMPANY, INC. SUBSIDIARIES

Agiomet, Inc.
Aliquippa and Southern Railroad Company
Apieco Assurance Ltd.
BCNR Mining Corporation
Beatrice Pocahontas Company
Beckley Coal Mining Company

Bristol Quebec Mining Co., Limited
Buffalo River Improvement Corporation
Carryore, Limited
Chicago Short Line Railway Company
Crystalane, Inc.
Bardale Coal Company
Crystalee
Cuyahoga Valley Railway Company, The
Mahoning Valley Railway Company, The
Dearborn Leasing Company
Donner-Hanna Coke Joint Venture
Economy Fuel and Supply Company
Qundr Corporation
Iron Ore Company of Canada
Jay & Sea Corporation
Jalcite I, Inc.
Jalcite II, Inc.
Black River Line Company
Jalore Mining Company, Ltd.
Jones & Laughlin Environmental Properties, Inc.
Jones & Laughlin Mining Company
Jones & Laughlin Ore Mining Company
J&L Clilffs Ore Partnership
Tilden Mine Joint Venture
Knoll Lake Minerals Limited
Lorain Pellet Terminal Co.
Monongahela Connecting Railroad Company, Inc.
Midland Terminal Company, The
Mesaba-Cliffs Mining Company, The
Negaunee Mine Partnership
Nemacolin Mines Corporation
Northern Land Company
Olga Coal Company
Pioneer Pellet Plant

Presque Isle Corporation
R-N Corporation
Republic Hibbing Corporation
Hibbing Development Company
Hibbing Taconite Company
Republic-Reserve, Inc.
Reserve Mining Co.
Reserve Mining Co.
Republic Technology Corporation
Reserve Mining Company
Reserve Mining Company
Ress Realty Company
The Terminal Garage Company
Sandy Ridge Energy Corporation
Knox Creek Coal Corporation
Lassie Coal Corporation
Sandy Ridge Carbon Corporation
The Prospect Corporation
Sao Carlos Minerios S.A.
Sao Thomas Minerios S.A.
Minerios Minerva S.A.
The River Terminal Railway Company
Tuscaloosa Energy Corporation
Union Drawn Steel Company, Limited
Wabush Iron Co. Limited
Arnaud Railway Company
Wabush Lake Railway Company, Limited
Youngstown Erie Corporation
Erie Development Company
Erie Mining Partnership
Erie Mining Company
YST Erie Corporation

APPENDIX B

OTHER LITIGATION BETWEEN MR. GOTTSCHALL AND J&L

1. On September 5, 1980 Mr. Gottschall filed a class action complaint against J&L in *V. P. Gottschall, et al. v. Jones and Laughlin Steel Corporation, et al.*, No. GD 80-12?8 (Court of Common Pleas of Allegheny County, Pennsylvania) which requested dissemination of certain financial information for 1978 and 1979. That action was discontinued on September 24, 1980 based on a stipulation of counsel and without prejudice to J&L's position as to any liability for dissemination of financial information.

2. On May 27, 1981 Mr. Gottschall filed another class action complaint in *V. P. Gottschall, et al. v. Jones and Laughlin Steel Corporation, et al.*, GD 81-14167 (Court of Common Pleas of Allegheny County, Pennsylvania) which requested dissemination of certain financial information for 1980. That action was subsequently discontinued by Mr. Gottschall because the requested information had already been sent to J&L preferred shareholders before Mr. Gottschall's complaint had been served upon J&L.

3. On June 19, 1981 Mr. Gottschall, as a named class plaintiff, with the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnick as counsel, filed a class action complaint against J&L in *Forstall, et al. v. Jones & Laughlin Steel Corporation, et al.*, Civil Class Action No. 81-1020 (United States District Court for the Western District of Pennsylvania). On March 24, 1982 Judge Bloch granted J&L's motion to disqualify Mr. Gottschall and the Strassburger firm to prevent violations of Canon 4 of the Code regarding the potential disclosure of confidences gained by Mr. Gottschall during his employment as counsel for J&L. No appeal was taken. On October 26, 1982 Judge Mencer denied the motion of the remaining named plaintiffs to

certify the action as a class action on the ground that they had not satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure. On February 7, 1983, the court granted J&L's motion for summary judgment dismissing the claims of the remaining individual plaintiffs for failure to state a claim under the federal securities laws. This order was affirmed by the U.S. Court of Appeals for the Third Circuit in a judgment order dated September 15, 1983. No petition for a writ of certiorari was filed.

4. On May 14, 1985 Mr. Gottschall filed an action against J&L in *V. P. Gottschall v. Jones & Laughlin Steel, Inc., formerly Jones & Laughlin Steel Corporation, a/k/a LTV Steel Corporation,* No. GD85-8594 (Court of Common Pleas of Allegheny County, Pennsylvania). This action is an attempt by Mr. Gottschall to recover attorneys' fees he incurred in his defense of a replevin action by J&L against Mr. Gottschall to obtain the return of J&L documents that Mr. Gottschall had in his possession. The replevin action was filed on March 9, 1981 and was discontinued by praecipe on May 16, 1983 pursuant to a joint stipulation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EDWARD L. FORSTALL, et al.,
Plaintiffs,

vs.

JONES & LAUGHLIN STEEL CORPORATION, et al.,
Defendants.

Civil Action No. 81-1020

MEMORANDUM OPINION

BLOCH, District J.

This action is brought pursuant to the Securities Exchange Act of 1934 charging that defendants made false and misleading public statements regarding the stock of Jones & Laughlin Steel Corporation (hereinafter referred to as "J & L") for the purpose of defrauding its shareholders. Plaintiffs allege that such statements and omissions were designed to diminish the value of the stock so that LTV Corporation could purchase the J & L stock of public shareholders at a substantially depressed price.

Defendants (Jones & Laughlin Steel Corporation, LTV Corporation, Jones & Laughlin Industries, Inc., Paul Thayer, Raymond Hay, and Thomas C. Graham) have moved to disqualify and dismiss the complaint of V. P. Gottschall (hereinafter referred to as "Gottschall") who served as counsel for J & L for ten years. Defendants allege that there is a substantial relationship between the subject matter of this litigation and matters handled by Gottschall as counsel for J & L in 1978. Defendants contend that this relationship creates an irrebuttable presumption of confidentiality which prohibits Gottschall from initiating or

participating in litigation against J & L by virtue of case law interpreting Canons 4 and 9 of the Code of Professional Responsibility. Plaintiff Gottschall responds that whether there is a substantial relationship between the subject matter of this suit and his previous work as an attorney for J & L is immaterial because he is not charged with confidences when the client seeks to perpetrate a fraud or criminal scheme.

Defendants also seek disqualification of Gottschall counsel, E. J. Strassburger, Howard F. Messer, and H. Yale Gutnick (hereinafter the "Strassburger firm"), on the ground that counsel has obtained knowledge about the case through the disclosure of confidential information by Gottschall. For the same reason, defendants seek dismissal of the two plaintiffs remaining as class representatives, Edward L. Forstall and William L. Livitski.

The Third Circuit Court of Appeals reviewed a similar case in 1972 involving an attorney who owned stock in a corporation which he had previously represented and who initiated a shareholders' derivative suit against the corporation for allegedly issuing a false and misleadiing proxy statement in connection with a merger. *See, Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (1972). The Court upheld an order disqualifying the attorney as plaintiff in the class action and shareholders' derivative suit on the ground that Canon 4 of the Code of Professional Responsibility, which concerns client confidentiality, might be breached.

The Court reviewed the rationale underlying Canon 4 and found that "the free flow of information from client to attorney, so vital to our system of justice [would] be irreparably damaged" if an attorney were permitted to reveal confidences. *Richardson, supra,* at 1384, citing *United*

States v. Standard Oil Company, 136 F. Supp. 345, 355 (S.D. N.Y. 1955); ABA, Informal Opinion No. 287 (1953). The test for determining whether confidences would be breached is whether the second suit is "so closely connected with the subject matter of the earlier representation that confidences *might* be involved." ABA, Informal Opinion No. 1233 (August 24, 1972). As the Seventh Circuit Court of Appeals recently noted, a finding that the subject matter is related amounts to an irrebuttable presumption that confidentiality existed in order to avoid "compelling the former client to prove the very things that he seeks to keep confidential." *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1341 (1981).

In support of their motion, defendants state that Gottschall was employed from February of 1969 through January 15, 1979, as an attorney with general responsibility for J & L's compliance with securities law. In 1976, he was promoted to the position of Assistant General Counsel with securities matters assigned to his supervision. On this point, Gottschall admits in his answer that he participated on behalf of J & L in discussions and reviews of drafts of a proxy statement relating to the merger of LTV and Lykes, which is described in Paragraph 36 of the Complaint. Also, defendants claim that Gottschall's counsel for this action, the Strassburger law firm, has examined documents of J & L which relate to this litigation and were taken by Gottschall during or after his employment as an attorney for J & L. On this point, Gottschall admits removal of documents which relate to J & L, but he denies that the documents were the property of J & L. Further, he admits that some of the documents relate to the merger of LTV and Lykes and that the Strassburger firm has examined those documents. This Court finds that Gottschall's

involvement in any discussions regarding the merger of LTV and Lykes as counsel for J & L is past representation which bears on the present action. As the Seventh Circuit Court of Appeals noted in a recent opinion, "[w]here parts of the present action and the past representation concern the very same subject matter, reasonable minds must agree they are substantially related." *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1341, 1346 (1981).

Gottschall contends that whether or not there exists a substantial relationship between these matters, J & L cannot assert the privilege of confidentiality because there is no such privilege where a client seeks the attorney's advice in furtherance of the commission of a fraud: "He must let the truth be told." *Clark v. United States,* 289 U.S. I, 53 S.Ct. 465, 77 L.Ed. 993 (1933) (Cardoza, J.). Defendants respond that letting the truth be told is a far cry from initiating a suit for personal monetary gain. The same point was raised and succinctly answered by the Southern District Court of New York in 1971 in an opinion which was upheld by the Second Circuit Court of Appeals: "If an attorney believes that executives of a corporate client are engaging in wrongful conduct, he may disclose this to the corporation's board of directors; but he infringes Canon 4 if he himself institutes suit. ABA Opinion 202 (1940)." *Doe v. A. Corp.,* 330 F. Supp. 1352 (1971), affirmed, 453 F.2d 1375 (2d Cir. 1972).

Finally, Gottschall argues that he should be permitted to maintain his suit against the remaining defendants, LTV Corporation and Jones & Laughlin Industries, Inc. (hereinafter referred to as "JLI"), if his suit against J & L is dismissed. The complaint alleges that J & L and JLI were subsidiaries of LTV. For purposes of ethical considerations, the ABA Committee on Ethics and Professional

Responsibility has opined that "as a matter of reality and practicality," the separate legal entities of the corporations should be ignored. ABA Informal Opinion 973.

This Court, therefore, finds that Gottschall's complaint should be dismissed. In responding to the motion, Gottschall admitted that his own disqualification would require disqualification of the Strassburger firm. Indeed, for the disqualification to serve its intended purpose of prohibiting the disclosure of client confidences, this Court will also enjoin Gottschall and the Strassburger firm from disclosing confidential information to anyone.

In addition to disqualification of the Strassburger firm, defendants seek dismissal of the suit brought by plaintiffs Edward L. Forstall and William J. Livitski on the ground that they may be privy to confidential information disclosed by Gottschall. Affidavits submitted by the named plaintiffs indicate no exchange of confidential information has taken place. Since both parties have urged this Court to decide defendants' motion based on the facts set forth in pleadings and affidavits of record, this Court finds no evidence which would support dismissal of the complaint brought by plaintiffs Forstall and Livitski. Dismissal of Gottschall's complaint does not interfere with the right of other class members to maintain this action.

An appropriate Order will be issued.

Date: 3/24/82

ALAN N. BLOCH
United States District Judge

ORDER

AND NOW, this 24th day of March, 1982, upon consideration of the Motion to Disqualify the Named Plaintiffs and the Attorneys for the Plaintiff Class and to Dismiss this Action filed by Defendants, Jones & Laughlin Steel Corporation, LTV Corporation, Jones & Laughlin Industries, Inc., Paul Thayer, Raymond Hay, and Thomas C. Graham, in the above captioned matter on October 1, 1981,

IT IS HEREBY ORDERED that said Motion is GRANTED in part as follows:

1. V. P. Gottschall is disqualified as a named plaintiff and as a class representative;

2. V. P. Gottschall is prohibited from communicating to other class members any information concerning J & L that he acquired in connection with his employment as an attorney for J & L;

3. H. Yale Gutnick, Howard F. Messer, E. J. Strassburger and the firm of Strassburger, McKenna, Messer, Shilobod & Gutnick are disqualified from representing any members of the class in this or any similar action; and

4. H. Yale Gutnick, Howard F. Messer, E. J. Strassburger and the firm of Strassburger, McKenna, Messer, Shilobod & Gutnick are prohibited from communicating to class members any information they received from V. P. Gottschall that he acquired in connection with his employment as an attorney for J & L.

IT IS FURTHER ORDERED that said Motion is DENIED, insofar as Defendants seek to disqualify E. L. Forstall and W. J. Livitski.

ALAN N. BLOCH
United States District Judge

cc: E. J. Strassburger, Esquire
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